

BENJAMIN D. Rodriguez

NAME

F-72457

PRISON NUMBER

R.J. DONAVAN P.O. Box 799002

CURRENT ADDRESS OR PLACE OF CONFINEMENT

San Diego CA 92179

CITY, STATE, ZIP CODE

FILED

2007 DEC -3 PM 3:03

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY RM DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Benjamin D. Rodriguez

(FULL NAME OF PETITIONER)

PETITIONER

v.

Warden Hernandez

(NAME OF WARDEN, SUPERINTENDENT, JAILOR, OR AUTHORIZED
PERSON HAVING CUSTODY OF PETITIONER [E.G., DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF CORRECTIONS])

RESPONDENT

and

The Attorney General of the State of
California, Additional Respondent.

Civil No

07CV2151 DMS (CAB)

(TO BE FILLED IN BY CLERK OF U.S. DISTRICT COURT)

**FIRST AMENDED
PETITION FOR WRIT OF HABEAS CORPUS**

UNDER 28 U.S.C. § 2254
BY A PERSON IN STATE CUSTODY

1. Name and location of the court that entered the judgment of conviction under attack: Superior Court of San Diego CA.
2. Date of judgment of conviction: May, 7, 2007
3. Trial court case number of the judgment of conviction being challenged: N/A
4. Length of sentence: 20 years with 9 strikes.

5. Sentence start date and projected release date: Feb. 2006 To → Mar. 2023
6. Offense(s) for which you were convicted or pleaded guilty (all counts): PC. 288
7. What was your plea? (CHECK ONE)
- (a) Not guilty ☐
- (b) Guilty ☒
- (c) Nolo contendere ☐
8. If you pleaded not guilty, what kind of trial did you have? (CHECK ONE)
- (a) Jury ☐
- (b) Judge only ☒
9. Did you testify at the trial?
- ☐ Yes ☒ No

DIRECT APPEAL

10. Did you appeal from the judgment of conviction in the California Court of Appeal?
- ☐ Yes ☐ No
11. If you appealed in the California Court of Appeal, answer the following:
- (a) Result: N/A
- (b) Date of result (if known): N/A
- (c) Case number and citation (if known): Not applicable
- (d) Names of Judges participating in case (if known): N/A
- (e) Grounds raised on direct appeal: Abuse of 1385 Disc., and illegal sentencing arbitration, 8th Amendment right violation, 6th and 14th Amendment right violation's. points and Authorities people V. Garcia (1999) 4th Disc. C.A.D.
12. If you sought further direct review of the decision on appeal by the California Supreme Court (e.g., a Petition for Review), please answer the following:
- (a) Result: N/A
- (b) Date of result (if known): _____
- (c) Case number and citation (if known): Unknown
- (d) Grounds raised: N/A

13. If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to that petition:

(a) Result: Not yet

(b) Date of result (if known): N/A

(c) Case number and citation (if known): unknown

(d) Grounds raised: In discovery.

COLLATERAL REVIEW IN STATE COURT

14. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Superior Court?

☐ Yes ☒ No

15. If your answer to #14 was "Yes," give the following information:

(a) California Superior Court Case Number (if known): N/A

(b) Nature of proceeding: N/A

(c) Grounds raised: N/A not applicabl in this present instance bring laymen at Law and having no access to the appropriate legal matiriols.

(d) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

(e) Result: It would of been impossible under the circumstance.

(f) Date of result (if known): N/A

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the California Court of Appeal?

☐ Yes ☒ No

17. If your answer to #16 was "Yes," give the following information:

- (a) **California Court of Appeal** Case Number (if known): N/A
- (b) Nature of proceeding: N/A
- (c) Names of Judges participating in case (if known) N/A
- (d) Grounds raised: N/A
- (e) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (f) Result: N/A
- (g) Date of result (if known): N/A

18. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions (e.g., a Petition for Writ of Habeas Corpus) with respect to this judgment in the **California Supreme Court**?
☐ Yes ☒ No

19. If your answer to #18 was "Yes," give the following information:

- (a) **California Supreme Court** Case Number (if known): N/A
- (b) Nature of proceeding: N/A
- (c) Grounds raised: N/A This is bien addressed under other authorities.
- (d) Did you receive an evidentiary hearing on your petition, application or motion?
☐ Yes ☒ No
- (e) Result: N/A
- (f) Date of result (if known): N/A

20. If you did *not* file a petition, application or motion (e.g., a Petition for Review or a Petition for Writ of Habeas Corpus) with the **California Supreme Court**, containing the grounds raised in this federal Petition, explain briefly why you did not:

Laymen at Law, No access to the appropriate legal material, No understanding of the nature of these petitions, and or motions or writs of habeitus Corpus.

COLLATERAL REVIEW IN FEDERAL COURT

21. Is this your **first** federal petition for writ of habeas corpus challenging this conviction?

☐ Yes ☐ No (If "YES" SKIP TO #22)

(a). If no, in what federal court was the prior action filed? N/A

(i) What was the prior case number? N/A

(ii) Was the prior action (CHECK ONE):

☐ Denied on the merits?

☐ Dismissed for procedural reasons?

(iii) Date of decision: N/A

(b) Were any of the issues in this current petition also raised in the prior federal petition?

☒ Yes ☐ No

(c) If the prior case was denied on the merits, has the Ninth Circuit Court of Appeals given you permission to file this second or successive petition?

☐ Yes ☐ No

CAUTION:

- **Exhaustion of State Court Remedies:** In order to proceed in federal court you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. This means that even if you have exhausted some grounds by raising them before the California Supreme Court, you must first present *all* other grounds to the California Supreme Court before raising them in your federal Petition.
- **Single Petition:** If you fail to set forth all grounds in this Petition challenging a specific judgment, you may be barred from presenting additional grounds challenging the same judgment at a later date.
- **Factual Specificity:** You must state facts, not conclusions, in support of your grounds. For example, if you are claiming incompetence of counsel you must state facts specifically setting forth what your attorney did or failed to do. A rule of thumb to follow is — state who did exactly what to violate your federal constitutional rights at what time or place.

GROUND FOR RELIEF

22. State *concisely* every ground on which you claim that you are being held in violation of the constitution, law or treaties of the United States. Summarize *briefly* the facts supporting each ground. (e.g. what happened during the state proceedings that you contend resulted in a violation of the constitution, law or treaties of the United States.) If necessary, you may attach pages stating additional grounds and/or facts supporting each ground.

(a) **GROUND ONE:** California penal Code: 1385 Discretion
Case LAW. people V. Garcia (1999)

Supporting FACTS: I was convicted and sentenced to 20
years with "9" strikes, This is indeed a 14th amendment right violation.
An 8th amendment right violation as well as a 6th Amendment right
violation: This is flagrant abuse of 1385 Discretion, The 9th circuit
~~the 4th and 2nd District as~~ Affirmed and the supreme court
upheld and severely cautioned the 4th and 2nd District as
to these discretion abuses, figuratively this an unfair and
illegal sentence structure. The trial court showed its exer-
cising of 1385 discretion in a arbitrary, capricious OR patently
absurd manner that resulted in a illegal sentencing structure.
Also there was no emphasis placed on the fact this
was a first offense there by blatantly disregarding the
9th circuits appeal to the second district and the 4th district,
revealing the enueadibility of reversal or meritorious grounds
for reversal, the caution was placed on the 4th district
to reveal a absurd pattern of 1385 discretion abuses.

Did you raise GROUND ONE in the California Supreme Court?

☐ Yes ☒ No.

If yes, answer the following:

- (1) Nature of proceeding (i.e., petition for review, habeas petition): _____
- (2) Case number or citation: _____
- (3) Result (attach a copy of the court's opinion or order if available): _____

(b) **GROUND TWO:** 8th Amendment right violation:

Supporting FACTS: As a first offense the sentencing Judge overarched his judicial power's, No where in the history of California sentencing law is there a case where a defendant being a first timer has entered into arbitration as to "9" strikes actually Sticking or being a permanent part of a plea agreement; Se wilding v. State of California (1996) 4th dis. people v. Trower, 6th dis. mo. people v. Brown 2003 Cal. Lexis 6516 CCA1. Aug. 27. This also is a form of coercion in that this sentence "currently" and and other conviction would be mandated: it is a due process error, this sentence must be set aside and reconsidered! it cannot and will not stand. This is reversible error and it is substantial. And the Law does mandate such relief as is equivalent to the damages accrued in this particular instance the defendant has suffered invariable under such illegal sentencing arbitration, in all actuality a misdemeanor offense was committed against the defendant if not only for sole purpose of future convictions this sentence must be vacated, and relief ordered Respectfully.

Did you raise **GROUND TWO** in the **California Supreme Court**?

☐ Yes ☐ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): _____

(2) Case number or citation: _____

(3) Result (attach a copy of the court's opinion or order if available): _____

(c) **GROUND THREE:** 14th Amendment right violation.

Supporting FACTS: Clearly the sentencing structure indicates reversible error. The damage accrued is accumulative, and if not addressed incurable: my constitutionally protected & inalienable guaranteed the 14th amendment right was violated when the sentencing judge did not fulfill the statutes criteria to ~~sentencing~~ the fullest extent of the LAW? Obviously I was not protected under my 14th amendment right's. This is nothing short of a due process violation, again the sentence must be set aside and reconsidered—Respectfully. Defendant would also pray the courts take into consideration the defendant has already accrued damage personally suffering under said arbitration. The damage accrued falls under multiple jurisdictions, it also falls under civil procedure the defendant however shall be satisfied with the finding of reversible error, and sent back to the trial judge for a setting aside of this illegal arbitration and resentencing, with "substantial relief." Any thing else under these circumstances would be unacceptable. The 9th Cir continues to blatantly disregard the 9th circuit Court of appeals reprimands and cautions.

Did you raise **GROUND THREE** in the **California Supreme Court**?

☐ Yes ☒ No.

If yes, answer the following:

(1) Nature of proceeding (i.e., petition for review, habeas petition): _____

(2) Case number or citation: _____

(3) Result (attach a copy of the court's opinion or order if available): _____

(d) **GROUND FOUR:** 6th Amendment right violation.

Supporting FACTS: Obviously court room administration was breached, fundamentally there is no court room administration if this inalienable right is obstructed, this is the apex of "due process" the above mentioned right violations are ("inseparable") if all entities in the court of law are not working conclusively, for this protected right there is and was no justice, the sentence there for must be reversed: this is also strongly upheld in the commission on judicial performance. These flagrant right violations actually teeter on judicial misconduct, no one given attorney could be oblivious to such blatant disregard to constitutionally protected right. The supreme court itself has severely cautioned against such systematic erosion of federally protected rights. We addressed the procedural prerequisite for the declaration against penal interest exception.

Did you raise **GROUND FOUR** in the **California Supreme Court**?

☐ Yes ☒ No.

If yes, answer the following:

- (1) Nature of proceeding (i.e., petition for review, habeas petition): _____
- (2) Case number or citation: _____
- (3) Result (attach a copy of the court's opinion or order if available): _____

23. Do you have any petition or appeal **now pending** in any court, either state or federal, pertaining to the judgment under attack?

☐ Yes ☒ No

24. If your answer to #23 is "Yes," give the following information:

(a) Name of Court: N/A

(b) Case Number: N/A

(c) Date action filed: N/A

(d) Nature of proceeding: N/A

(e) Name(s) of judges (if known): N/A

(f) Grounds raised: N/A

(g) Did you receive an evidentiary hearing on your petition, application or motion?

☐ Yes ☒ No

25. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing: In proper

(b) At arraignment and plea: _____

(c) At trial: _____

(d) At sentencing: _____

(e) On appeal: N/A

(f) In any post-conviction proceeding: _____

(g) On appeal from any adverse ruling in a post-conviction proceeding: N/A

26. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

☒ Yes ☐ No

27. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

☐ Yes ☒ No

(a) If so, give name and location of court that imposed sentence to be served in the future:

N/A

(b) Give date and length of the future sentence: N/A

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

☐ Yes ☒ No

28. Consent to Magistrate Judge Jurisdiction

In order to insure the just, speedy and inexpensive determination of Section 2254 habeas cases filed in this district, the parties may waive their right to proceed before a district judge and consent to magistrate judge jurisdiction. Upon consent of all the parties under 28 U.S.C. § 636(c) to such jurisdiction, the magistrate judge will conduct all proceedings including the entry of final judgment. The parties are free to withhold consent without adverse substantive consequences.

The Court encourages parties to consent to a magistrate judge as it will likely result in an earlier resolution of this matter. If you request that a district judge be designated to decide dispositive matters, a magistrate judge will nevertheless hear and decide all non-dispositive matters and will hear and issue a recommendation to the district judge as to all dispositive matters.

You may consent to have a magistrate judge conduct any and all further proceedings in this case, including the entry of final judgment, by indicating your consent below.

Choose only one of the following:

☐ Plaintiff consents to magistrate judge jurisdiction as set forth above.

OR

☐ Plaintiff requests that a district judge be designated to decide dispositive matters and trial in this case.

29. Date you are mailing (or handing to a correctional officer) this Petition to this court: _____
Nov. 19, 2007

Wherefore, Petitioner prays that the Court grant Petitioner relief to which he may be entitled in this proceeding.

SIGNATURE OF ATTORNEY (IF ANY)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

11-19-07

(DATE)

Benjamin D. Rodriguez

SIGNATURE OF PETITIONER